No. 569

# In the Supreme Court of the United States

OCTOBER TERM, 1942

FRANK TOT, PETITIONER

*v.*

THE UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT*

**BRIEF FOR THE UNITED STATES**

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The opinion of the circuit court of appeals (R. 74–91) is reported in 131 F. (2d) 261. The opinion of the district court on demurrer to the indictment (R. 51–53) is reported in 36 F. Supp. 273. The opinion of the district court on two trial motions, a reserved motion to dismiss and a motion for new trial (R. 53–62), is reported in 42 F. Supp. 252.[1]

[1] An opinion of the district court on petition for suppression of evidence in connection with a superseded indictment (R. 46–50), is reported in 28 F. Supp. 900.

### JURISDICTION

The judgment of the circuit court of appeals was entered October 28, 1942 (R. 92). The writ of certiorari was granted January 11, 1943 (R. 93). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

1. Whether the presumption clause of section 2 (f) of the Federal Firearms Act is unconstitutional under the Fifth Amendment.

2. Whether the presumption was rebutted so as to require the direction of a verdict, by uncontradicted but impeached defense testimony which the trial judge anticipated the jury might not believe.[2]

### CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment in pertinent part provides:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

Section 2 (f) of the Federal Firearms Act of 1933, 52 Stat. 1250, 1251, 15 U. S. C. Section 902 (f), in pertinent part provides as follows:

> It shall be unlawful for any person who has been convicted of a crime of violence

[2] The court's order granting certiorari limited the scope of review to the last two questions stated in the Government's memorandum on the petition for certiorari (R. 93).

> * * * to receive any firearm * * * which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act.[3]

**STATEMENT**

Petitioner was convicted after jury trial in the District Court for the District of New Jersey under an indictment in one count, alleging a violation of Section 2 (f) of the Federal Firearms Act of 1938 (R. 54). The indictment alleged that petitioner, having been previously convicted of two crimes of violence, a burglary and an assault and battery with intent to beat, wound, and ill-treat,[4] did on or about September 20, 1938, at Newark, New Jersey, "knowingly, unlawfully and feloniously receive a certain firearm, towit, a thirty-two calibre Colt automatic pistol, which said pistol had been shipped and transported in interstate commerce to the said City of Newark from a place to the Grand Jurors unknown" (R. 34). Petitioner was sentenced to two years' imprisonment (R. 2). On appeal to the Circuit

[3] The Act is set out in full in the Appendix to the Government's brief in a companion case, *United States* v. *Frank Delia*, No. 636, p. 50, *et seq.*

[4] Petitioner does not question that these crimes are "crimes of violence" under the definition of Section 1 (6) of the Act.

Court of Appeals for the Third Circuit, the judgment was affirmed (R. 92).

The evidence material to the questions now presented was as follows:[5]

Petitioner Tot had been convicted of an assault and battery in 1925, and had pleaded *non vult* to a burglary in 1932, both in the state courts of New Jersey (R. 14–15, Gov. Ex. 5 original). On September 22, 1938, he was found in possession of a fully loaded .32-calibre Colt automatic pistol, in his home at Newark, New Jersey (R. 8, 9). On this evidence the Government rested its case in chief, and the petitioner's motion for directed verdict was denied (R. 19).

Petitioner took the stand in his own defense and testified that he had purchased the gun in New Jersey in 1933 or 1934[6] from "one of the unfortunates that's around the dump" (R. 27, 30) He admitted the criminal record already proved in the Government's case and also a liquor conviction, and on cross-examination he admitted that his criminal record included in addition the carrying of concealed weapons in 1925 (R. 28–30). His sister and his wife testified that from time to time since the date of his stated acquisition of the gun, they had seen him in possession of that same gun (R. 32, 34–35). On cross-examination, however,

[5] Evidence material only to questions on which the Court did not grant certiorari has been omitted.

[6] I. e., four or five years prior to July 30, 1938, the effective date of the Act. Section 8.

both the wife and sister admitted that they were not certain that the pistol which they had seen over the period testified to was the one in question, and the wife admitted that the pistol which she had seen might have been a different one (R. 32–34, 35–37). The wife admitted conviction of a crime, though she could not remember what crime it had been (R. 32).

The Government introduced no evidence to contradict the testimony of any of the defense witnesses, confining its rebuttal evidence to testimony from a representative of the manufacturer of the gun, that the gun had been made in Connecticut and in 1919 was shipped by the manufacturer to Chicago, Illinois (R. 37–38). Petitioner's motion for directed verdict at the end of the whole case was denied (R. 39), and the jury found petitioner guilty (R. 2). Details of the evidence will be stated in the Argument.

## SUMMARY OF ARGUMENT

I. The question of the reasonableness of the provision of Section 2 (f) of the Federal Firearms Act, that possession of a firearm by a person who has been convicted of a crime of violence is presumptive evidence that he received it in interstate commerce after the effective date of the Act, is identical with that involved in the companion case of *United States* v. *Delia*, No. 636, and discussion in the instant brief is confined to demon-

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stration that the factual differences between the two cases are immaterial.

II. The presumption was not rebutted by the uncontradicted testimony of the defense witnesses, because that testimony was impeached and disbelieved. While no case in this Court appears to have dealt squarely with the question whether impeached uncontradicted testimony denying a presumed fact operates as a rebuttal of the presumption so as to demand the direction of a verdict against the presumption, the pattern of the federal criminal cases involving parallel presumptions under the narcotics statutes establishes that the mere utterance of testimony denying a presumption does not rebut it even in a criminal case. Moreover, this Court has consistently assumed that such testimony is insufficient to take the case away from the jury. From the viewpoint of the law of evidence, to regard impeached and disbelieved testimony as a rebuttal would encourage perjury by depriving the proponent of the benefit of cross-examination, and would defeat the purpose of the presumption, which is intended to produce the truth, not mere words. This is not to regard the presumption as evidence. This merely requires the production of evidence which on its own merits is sufficiently credible to create a reasonable doubt of guilt. It does not require or indeed permit that the presumption give impetus to any disbelief of the rebuttal evidence.

## ARGUMENT

### I

### THE PRESUMPTION OF SECTION 2 (f) OF THE FEDERAL FIREARMS ACT IS NOT ARBITRARY OR UNREASONABLE

The identical question of validity of the presumption of Section 2 (f) of the Federal Firearms Act, as a matter of due process, is presented in the companion case of *United States* v. *Frank Delia*, No. 636, and the Government's position on the question has been stated in full in our brief in that case. We point out there that the presumption has two principal phases, the presumption that the possessor acquired the gun in a transaction across a state line, and the presumption that this acquisition took place after the effective date of the Act, July 30, 1938. In the *Delia* case, which arose in Michigan, we rested the validity of both presumptions in part upon the provisions of Michigan law, under which special difficulties have for years been placed in the way of intrastate acquisition of guns by men who have criminal records for crimes of violence. Petitioner Tot was found in possession of a gun in New Jersey (R. 5, 7). New Jersey law has comparable provisions, set out at pages 20–21, footnote 14, of our brief in the *Delia* case. Although the instant gun was found in Tot's possession in New Jersey in 1938, less than two months after the effective date of the statute and almost 19 years to the day after it had left the manufacturer's Connecticut plant,

Tot's greater opportunity for acquisition before instead of after the effective date of the statute is of no consequence, because, as we pointed out in the *Delia* case, the presumption of acquisition subsequent to the effective date of the statute need not rest upon actual probabilities concerning opportunity for acquisition but, among other things, upon the possessor's greater accessibility to proof of prior acquisition.

With respect to the possibility of unrecorded acquisition before 1938 not in violation of state law, the instant case differs from the *Delia* case only in immaterial detail. New Jersey law, as we indicated in our *Delia* brief at the point cited, is not as rigid as Michigan law in two respects: (1) it does not forbid an unrecorded intrastate gift; and (2) it lacks a requirement that guns be registered by the possessor, which permits the possibility of legitimate acquisition prior to 1927 (when the state gun law was passed) without official record. Nevertheless, petitioner is not in a position to assert either of these possible means of legitimate unrecorded acquisition as ground for complaint against the instant presumption of acquisition subsequent to July 30, 1938. The gun was, to be sure, made in 1919, but the petitioner having testified to intrastate acquisition by *purchase* no earlier than *1933* (R 27, 30, 38), he is in no position to raise such possibilities in aid of his claims.

## II

### THE STATUTORY PRESUMPTION WAS NOT REBUTTED

Petitioner asserts (Br. p. 11) that he was entitled to a directed verdict at the end of the whole case,[7] since the Government's case rested on the statutory presumption which he claims was rebutted by uncontradicted testimony of the defense witness. This testimony, however, was impeached, and we submit that the trial court correctly sent the case to the jury for evaluation of the credibility of the impeached defense. We set out first the facts of the impeachment and thereafter the legal considerations bearing on the propriety of the trial court's action.

#### *A. The defense witnesses were impeached*

Undoubtedly the testimony of petitioner himself, that he acquired the gun in New Jersey in 1933 or 1934 (R. 27, 30), would, if believed, have amounted to a complete rebuttal of the presumption, for it asserted intrastate acquisition several years before the Act become effective in 1938. As to time of acquisition, his testimony was paralleled by that of his sister and his wife, the wife identifying the evidence gun as having been kept by petitioner since 1934, in a coat in a wardrobe in

[7] In the court below petitioner also complained of the charge to the jury (R. 40–43), but the court held that the charge given was clear and helpful and preferable to the confusing charge requested by petitioner (R. 84–85).

their home, the very place where it was found on the date in 1938 alleged in the indictment (R. 8, 32), and the sister identifying the evidence gun as having been kept by petitioner for some time in a wardrobe in her home prior to 1934 (R. 34–35). Nor was any of this testimony contradicted. But it was impeached.

The trial court, in denying a motion to set aside the verdict, characterized the defense story as one to "test the credulity of the credulous" (Opinion, R. 60). This opinion is supported not only by the relative improbability of petitioner's story, but also by petitioner's attitude and demeanor on the stand, which the trial judge like the jury had an opportunity to witness. Some indication of petitioner's attitude and demeanor remains even in the cold record (R. 30). In addition, in response to carefully framed direct examination questions, petitioner purportedly made a frank disclosure of his criminal record, including a liquor offense in addition to the two crimes of violence proved as part of the Government's case in chief (R. 24–25). Later, however, when it became apparent from cross-examination questioning that the Government was prepared to prove an additional offense, the carrying of concealed weapons, he hastened to admit the offense and to attempt a mitigation of the effect which the admission had of showing the lack of frankness of his direct testimony, for he made the statement, which the record demonstrates to be false, that he

had already admitted it on direct examination (R. 28; cf. R. 24–25).

The cross-examination at this point further shows petitioner's evasiveness and unreliability as a witness. The prosecutor, as noted, obtained an admission from petitioner that in addition to his other convictions he had been convicted of carrying concealed weapons (R. 28). Immediately, the following colloquy occurred (R. 29):

> Q. Oh, well, let's get this straight. We have this conviction that we are talking about now carrying concealed weapons and you say you pleaded non vult to it?
>
> A. That's right.
>
> Q. Are you quite sure that you weren't tried on that?
>
> A. On what?
>
> Q. On this same charge that we are talking about.
>
> A. What charge is that?
>
> Q. The charge is carrying concealed weapons and convicted on it after a verdict of guilty.
>
> A. What charge is that?
>
> Q. The charge is carrying concealed weapons. I am sorry to have to keep you straight on all this, but ——
>
> A. When was that?
>
> Q. I am referring to a charge of carrying a concealed weapon and on which you were found guilty after a trial and a verdict of guilty on June 22, 1925, is that right?
>
> A. No, sir.

Q. That is not?

A. No, sir. I did not have a trial.

Q. You did not have a trial?

A. A jury trial if you mean that, I did not. I pleaded non vult for a Judge.

Q. And then if the official records of that court should show that you were tried by a Judge after a waiver of a trial by a petit jury, and that your application for trial by a Judge was granted, and that the Judge handed down a verdict of guilty after trial was moved, then the records of the court, if they so show, are in error?

A. Well, there was a party—he is not here now—the man that defended me, and he was at the trial.

Q. But at any rate, whether you are right or the records of the court are right, you were convicted on that charge of carrying a concealed weapon in 1925?

A. On circumstantial evidence.

Q. Oh, I thought you pleaded guilty.

A. Yes, because I was a young boy at the time.

Q. I thought you were worried about the circumstantial evidence.

A. After I found out later on in years, I knew what it was, all right, it was too late.

Petitioner's evasiveness and lack of frankness, his inconsistency, the improbability of his story of the acquisition of the gun, coupled with his distinguished criminal record, combined to cast grave doubt on his credibility and to justify the jury in its disbelief of his story.

The other defense witnesses were petitioner's wife and sister. Aside from the pull of family bias, the wife on cross-examination admitted a conviction but twice asserted that she could not remember of what she had been convicted (R. 32–33), a lapse of memory so amazing that neither trial court nor jury could be expected to place credence in her. Moreover, the confident corroboration which both women offered on direct examination, that petitioner had had the gun continuously from the time he testified he purchased it, broke down on cross, as the court below pointed out (R. 83–84). Both admitted that they did not know whether the evidence gun was the one they had seen in Tot's possession at the times they had seen a gun in his possession, nor even that the gun which they had so seen from time to time was always the same gun (R. 32–37). Such testimony falls far short of positively identifying the evidence gun as the one which Tot claimed to have purchased in 1933 or 1934, particularly in view of his record for the carrying of a concealed weapon back in 1925, already mentioned (R. 28–29): there was no reason for anyone to believe that the evidence gun had been his only gun.

B. *The trial judge properly denied the directed verdict and sent the case to the jury*

The trial judge properly refused to regard this impeached defense testimony as a rebuttal requiring him to direct a verdict for petitioner

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This testimony was not of the type which, even though as here uncontradicted by other evidence, the jury is required to believe.[8] Therefore, the question whether petitioner had rebutted the statutory presumption was for the jury to decide, for it depended entirely on whether the jury attached credence to the defense testimony.

While there are some state decisions which suggest the view[9] that any evidence, even that which the jury might disbelieve, is sufficient to rebut a presumption unsupported by parallel evidence, the expressions of this Court indicate that it has never adopted that view. This Court has stated the requirements of rebuttal of a presumption in terms of "clear, distinct and convincing proof", *Fresh* v. *Gilson*, 16 Pet. 327, 331; "ascertained and established facts", *Lincoln* v. *French*, 105 U. S. 614, 617; "substantial proof", *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 170. These expressions presuppose that normally whether an unsupported presumption has been rebutted is a

[8] See *Chesapeake & Ohio Ry.* v. *Martin*, 283 U. S. 209, 216, stating and applying the rule that uncontradicted, testimony may not be disbelieved by the jury where it is *clear, candid* and *unimpeached*, and therefore may be made the basis for a directed verdict. Other cases are collected in McBaine, *Inferences: Are They Evidence?*, 31 Calif. L. Rev. 108, 110 (n. 14) December, 1942.

[9] For review of the cases, see Morgan, *Presumptions* (1937), 12 Wash. L. Rev. 255.

jury question.[10] And consistently with these expressions, in *Mobile, Jackson and Kansas City R. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43, this Court made plain that the mere introduction of rebuttal testimony does not make mandatory the direction of a verdict, when it said that a statutory presumption does not deny due process if it "does not shut out from the party affected a reasonable opportunity *to submit to the jury* in his defense all the facts bearing upon the issue." [Italics supplied.] Likewise, in the latest presumption case, *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, 111, this Court said that the presumption requires the opponent "if he would avoid the inference, to go forward with evidence *sufficient to persuade* that the nonexistence of the fact, which would otherwise be inferred, is as probable as its existence", but that if the opponent "does go forward with evidence *enough to raise doubts* as to the validity of the inference, which the *trier of fact* is unable to resolve" [italics supplied], he is entitled to judgment notwithstanding the presumption. The references to the jury and to the trier of fact show unmistakably that this Court has believed

[10] In the *Gamer* case, there apparently was some evidence to support the presumption, but in holding that the presumption disappeared when rebutted by "substantial proof," the Court necessarily regarded the presumption, independently of the parallel evidence and therefore as if unsupported by any, as remaining effective until rebutted by "substantial proof."

that defenses to presumptions are to be evaluated by the jury or other trier of fact. Moreover, as we shall later show, in every case in which this Court has set aside trial judgments for improper treatment of the rebuttal, the impropriety has involved instructions given the jury for guidance in evaluating the rebuttal. The propriety of allowing the jury to evaluate the rebuttal has not been questioned.

*Davis* v. *United States*, 160 U. S. 469, the leading case in this Court on the quantum of evidence needed to overthrow a presumption in a criminal case, is wholly inconsistent with the theory that a presumption is overthrown by the mere introduction of contradicting evidence. There evidence had been introduced to rebut the presumption that the defendant was sane, and no evidence was introduced by the prosecution in support of the presumption. The question debated in the opinion of the Court was whether the defendant must rebut the presumption by a preponderance of the evidence or merely by creating a reasonable doubt. The Court chose the latter alternative. The underlying assumption of the decision is that the question is one for the jury to decide, though the only evidence for the jury to consider be evidence contradicting the presumption. It is a necessary conclusion that the jury can competently decide, in the face of such evidence, that the defendant is sane. The *Davis* decision was followed in *Matheson* v. *United States*, 227 U. S. 540.

Consequently, we submit that the court below properly concluded (R. 82) that the correct rule to be applied herein, within the limit on the burden of persuasion established for criminal cases in the *Davis* case, is that:

> It is the duty of him against whom any presumption operates to produce evidence, not merely witnesses, and therefore he must satisfy the jury of the credibility of his witnesses. Bohlen, *The Effect of Rebuttable Presumptions of Law upon the Burde of Proof* (1920), 68 U. of P. L. Rev. 307, 315 n. 13.

When Congress enacted the statutory presumption herein involved, it could have found the foregoing indications of what this Court thought was required to rebut a presumption. Moreover, it could have found a series of decisions by circuit courts of appeals holding that under the Harrison Narcotics Act,[11] which contained a presumption arising from possession from which the presumption herein involved was copied, credible

[11] Internal Revenue Code, § 3224, Act of December 17, 1914, 38 Stat. 785, making possession of narcotics by an unregistered and untaxed person, other than within specified medical exemptions, "presumptive evidence" of unlawful trafficking. The 1919 amendment, Internal Revenue Code, § 2553, Act of February 24, 1919, 40 Stat. 1130, adds a prohibition of purchase, sale, dispensing, and distribution except in original stamped packages, and provides that the absence of appropriate tax-paid stamps shall be "prima facie evidence" of violation when the narcotics are found in the hands of an unregistered person.

evidence is needed to rebut the presumption and the credibility of the evidence is a jury question. *Davis* v. *United States*, 16 F. (2d) 778 (1927, C. C. A. 5); *Gowling* v. *United States*, 64 F. (2d) 796 (1933, C C. A. 6); *Stobble* v. *United States*, 91 F. (2d) 69 (1937, C. C. A. 7).[12] In view of the uniform pattern of federal decision and opinion to which Congress could have turned, the inference may fairly be drawn that when Congress enacted the instant statutory presumption it intended the presumption to have the effect given other presumptions in the foregoing decisions by this Court and the circuit courts of appeals. Cf. *Hecht* v. *Malley*, 265 U. S. 144, 153; *Latimer* v. *United States*, 223 U. S. 501, 504.

Since we are here dealing with a statutory presumption, the intention of Congress is controlling, so the inquiry should be directed toward determining what effect Congress intended the presumption to have. If the prosecution could normally produce evidence to contradict the rebuttal, to what point did Congress create the presumption itself? The rebuttal is not intended to be merely a pleading. The whole purpose of the presumption, corresponding to its primary justification under the

[12] Cf. *Ezzard* v. *United States*, 7 F. (2d) 808 (C. C. A. 8), a Harrison Act case, directing a verdict against the presumption because the uncontradicted rebutting evidence was "unimpeached." The court conceded that the presumption was not rebutted unless the evidence was credible, and agreed that normally the contradicting evidence must go to the jury. *Ibid*, 812. See footnote 8, *supra*.

due process clause, is to require that the defendant, as possessor of the truth, bring truth to light."[13] This consideration indicates that Congress intended the presumption to be the means of forcing the introduction by the defendant of credible evidence, of evidence which would justify the jury in having a reasonable doubt that the defendant was guilty, before the defendant could be acquitted.

Another reason to doubt that Congress intended the presumption to be without further effect once the defendant introduced contrary testimony, lies in the fact that such a rule would deprive the prosecution of all benefit of cross-examination. The instant case serves to illustrate that such would be the effect of the rule petitioner urges, because here the only evidence relating to the facts presumed by the presumption was the testimony on direct examination of petitioner, his wife and sister, and the impeaching testimony elicited from each on cross-examination. As both judge and jury disbelieved the defense testimony after it was impeached on cross-examination, the value of the cross-examination is clear. Yet it either should not have been allowed or should have been ignored, if petitioner's contention be sound.

The search for the truth would not be furthered by having the presumption satisfied by evidence

[13] See Bobbé, *The Uncontradicted Testimony of a Disinterested Witness* (1934), 20 Corn. L. Q. 33, suggesting that uncontradicted testimony be taken as true only if relating to matter within both parties' knowledge, and applying this to presumption rebuttal, *ib.*, 48–49.

which is disbelieved to the point where it does not create a reasonable doubt. As "The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth" (*Funk v. United States*, 290 U. S. 371, 381)," the rule urged by petitioner should not be accepted.

Petitioner bases his contention on the familiar text-book formula that the function of a presumption is to compel the jury to reach a conclusion in the absence of evidence to the contrary, and if such evidence is "offered" or "introduced" the presumption "disappears." Wigmore, *Evidence* (3d ed. 1940) sec. 2491; 20 *Am. Jur.* 170, Evid. sec. 166. In support of his position he cites cases which contain general remarks to the effect that a presumption is rebutted when "uncontradicted" evidence "tending" to show the contrary of the facts presumed is "brought forward" or "introduced." Other cited cases say that a presumption must not "shift the burden of persuasion" or

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[11] Other decisions of this Court also emphasize that judicial trials are searches for the truth. Sham denials are disregarded (*Local 167 v. United States*, 291 U. S. 293). The trial judge may warn the jury of the danger of bias on the part of the defendant-witness (*Reagan v. United States*, 157 U. S. 301; *Johnson v. United States*, 157 U. S. 320). And a trial judge may authorize the jury to ignore the entire testimony of an incredible witness under the *falsus in uno* doctrine (*Allen v. United States*, 164 U. S. 492, 499–500). The trial judge gave an *Allen* charge in this case (R. 42), and a mild form of the *Reagan* charge in the *Delia* case (No. 636, R. 19).

"operate as evidence." Without exception, none of petitioner's cases holds what he needs to establish, i. e., that impeached testimony tending to rebut a presumption demands the direction of a verdict unless it is in turn met by contradictory testimony.

*Alpine Forwarding Co.* v. *Pa. R. R. Co.*, 60 F. (2d) 734 (C. C. A. 2), and *Essmeister* v. *Roadway Transit Co.*, 275 Mich. 387, 277 N. W. 391 (1936), are both cited by petitioner (Br. p. 9) in support of the proposition that the mere introduction of contrary evidence dissipates a presumption, the *Essmeister* case presumably for its dictum that the rebuttal occurs "when the evidence is introduced from which the facts can be found," (277 N. W. at 392), the *Alpine* case presumably for its reference to "substantial" evidence (60 F. (2d) at 736) as sufficient to rebut. But both cases dealt with the type of presumption which, if not rebutted, results in the direction of a verdict for the proponent and if rebutted raises a jury question. Applied to a criminal proceeding, where a verdict can of course never be directed for the prosecution, such cases at most establish a defendant's right to go to the jury, which is just what the trial court granted here.

Others of petitioner's cases (*Carroll* v. *Prudential Ins. Co.*, 125 N. J. L. 397, 15 Atl. (2d) 810 (1940); *Hoffman* v. *Lasseff*, 110 N. J. L. 122, 164

Atl. 293 (1932); *Caswell* v. *Maplewood Garage*, 84 N. H. 241, 149 Atl. 746 (1930); *Dunn* v. *Goldman*, 111 N. J. L. 249, 168 Atl. 299 (1933); *Connecticut Mutual Life Ins. Co* v. *Lanahan*, 112 F. (2d) 375 (C. C. A. 6); *Rhodes* v. *Pennsylvania R. R. Co.*, 298 Pa. 101, 147 Atl. 154 (1929); and *E. S. Company* v. *Rocheleau*, 52 R. I. 378, 161 Atl. 145 (1932)), involve uncontradicted evidence of a type which the jury is always required to believe.[15] They all held it proper to direct a verdict against the proponent of a presumption on clear, candid, unimpeached and uncontradicted rebuttal testimony. Thus in the *Carroll* case the court characterized the rebutting evidence as "clear and definite" and commented that "from a consideration of all the testimony a reasonable man could reach only one conclusion." In the *Hoffman* case the court noted that the cross-examination of the rebutting witnesses was unsuccessful, and in the *Caswell* and *Dunn* cases there was no showing of any cross-examination whatsoever, indeed the rebutting testimony in the latter case was commended as "plenary." Similarly, in the *Lanahan* case there was no question of credibility and the court commented that "all of the physical facts point unerringly" to the rebuttal of the presumption. The same is true of the *Rhodes* case, where the rebuttal testimony was treated as "established

[15] See footnotes 8 and 12.

facts," "facts clearly proven," "uncontrovertibly proven facts," and of the *E. S. Company* case, where there was no cross-examination and the defense testimony was noted to be "consistent and reasonable." None of these cases thus raised the present issue of defense credibility, for they did not pass on the possibility, actualized in the instant case, that an uncontradicted rebuttal might nevertheless be impeached and disbelieved.

One of the two cases most strongly relied on by petitioner, *McIver* v. *Schwartz*, 50 R. I. 68, 145 Atl. 101 (1929), not only does not support petitioner's contention that he was entitled to a directed verdict, but more important, it illustrates the inevitable compromises to which attempted adherence to petitioner's rule will lead a court. Rhode Island appears to be a state where the courts attempt to follow petitioner's rule, yet in *McIver* v. *Schwartz*, an automobile accident case where the plaintiff relied on the presumption that the driver had the defendant's authorization, the trial judge did not believe the defendant's rebutting testimony and refused to direct a verdict for the defendant. The jury also disbelieved the defendant and returned a verdict for the plaintiff. The state supreme court was apparently of the view that normally a verdict should have been directed for the defendant. But it was unable, in the face of the fact that neither the judge nor the jury had believed the defendant's rebuttal, to conclude that the defendant was entitled to a

directed verdict.[16] Yet it ordered a new trial. The ordering of a new trial does not meet the issue, since its only effect is to give the defendant an opportunity to retell his story, and if the second telling is no more convincing that the first, what is the next step? *McIver* v. *Schwartz*[17] is well known and discredited. In *O'Dea* v. *Amodeo,* 118 Conn. 58, 170 Atl. 456 (1934), it was reviewed and rejected, and a trial court order setting a verdict aside on comparable facts was reversed.[18] See Morgan, *Instructing the Jury on Presumptions and Burden of Proof,* 47 Harv. L. Rev. 59, 78–81, criticizing the *McIver* rule as incentive to perjury; and for criticism on doctrinal grounds see Morgan, *Some Observations Concerning Presumptions,* 44 Harv. L. Rev. 906, 912–913, 918–919.

It is unnecessary to enter into detailed discussion of the other state court cases cited by

[16] The court's language was emphatic: "A trial justice should not direct a verdict on testimony which he does not believe" (50 R. I., at 70).

[17] *Normandin* v. *Parenteau* (R. I.), 150 Atl. 460 (1930), also relied on by petitioner, is a *per curiam* decision, not officially reported, by the same state court. It held it proper for a trial judge to set aside the jury verdict for a plaintiff who had relied on a presumption but had herself given testimony tending to rebut the presumption.

[18] For similar emphasis on the need for credible rebutting testimony, see *Chaika* v. *Vandenberg,* 252 N. Y. 101, 169 N. E. 103 (1929); *Andrew Jergens Co.* v. *Connor,* 125 F. (2d) 686, 689 (C. C. A. 6); *Tschudi* v. *Mutual Life Insurance Co.,* 72 F. (2d) 306 (C. C. A. 8). See also *Luria* v. *United States,* 231 U. S. 9, 19.

petitioner on the matter of rebuttal, since none of them deal with uncontradicted rebuttal or the direction of a verdict against a presumption, nor do they even contain discussion of those subjects.[19] They are of interest only as enunciating the standard doctrines that a presumption is not evidence, and must not shift the burden of persuasion. With such cases, it must be apparent, we need have no dispute even as to language. Although, as Mr. Justice Black has pointed out in his dissent in *New York Life Insurance Co.* v. *Gamer*, 303 U. S. 161, 172, 175–177, refusal to allow a presumption to operate as evidence or to shift the burden of persuasion may invite a rule of law giving the trial judge power to direct a verdict,[20] we need not in this case deny that it is proper for the trial judge to direct a verdict in the face of a presumption where the rebutting evidence is

[19] This applies to petitioner's citation of *Tyrell* v. *Prudential Ins. Co.*, 109 Vt. 6, 192 Atl. 184 (1937); *Minutilla* v. *Providence Ice Cream Co.*, 50 R. I. 43, 144 Atl. 884 (1929); *Walters* v. *Western, etc., Life Ins. Co.*, 318 Pa. 382, 178 Atl. 499 (1935); *Kelly* v. *Hudson Coal Co.*, 119 Pa. Super. 405, 179 Atl. 753 (1935); and *Domanowski* v. *Prudential Ins. Co.*, 116 N. J. L. 247, 182 Atl. 906 (1936). *Podolsky* v. *Sautter*, 102 N. J. L. 598, 133 Atl. 199 (1926), appears to be a routine automobile accident appeal, with no presumption question or presumption language.

[20] The doctrine of "disappearing presumptions," as Mr. Justice Black termed it in the *Gamer* case, traces to a passage in Thayer, *Preliminary Treatise on Evidence* (1898), 346. But Thayer does not treat the problem of sending the case to the jury, but deals with trial rulings excluding, or charges minimizing, the rebuttal evidence.

clear, candid, and unimpeached, as in petitioner's cases discussed above, pp. 21–23, and in *Ezzard* v. *United States,* 7 F. (2d) 808, *supra,* note 12. Questions of burden of persuasion and the doctrine that a presumption is not evidence, as the very phrases connote, are of importance only in cases like *Davis* v. *United States,* 160 U. S. 469, *supra,* and the *Gamer* case itself, as problems of instructing the jury, since it is the jury which must weigh evidence and be persuaded. Such problems do not arise until the case passes beyond the stage of motion for directed verdict, which is the stage involved here because the trial judge sent the case to the jury for evaluation of a defense which he himself thought incredible.

The cases in which this Court has turned decision upon the doctrine that a presumption must not operate as evidence or shift the burden of persuasion have been cases of erroneous instructions to the jury. These have been cases where circumstantial evidence was offered, to rebut the presumption that death was accidental and not suicide (*Del Vecchio* v. *Bowers,* 296 U. S. 280; *New York Life Ins. Co.* v. *Gamer,* 303 U. S. 161) or to rebut a statutory presumption of negligence (*Western & Atlantic Railroad* v. *Henderson,*[21]

[21] In the *Western & Atlantic Railroad* case this Court declared unconstitutional a state statute creating a presumption, because the state courts had construed the presumption as having the status of evidence. As the presumption herein is not evidence, the case has no relevance.

279 U. S. 639). In such situations no eyewitness testifies to the ultimate fact of accident or suicide, negligence or due care. The jury's task is a very difficult one of weighing against one another the competing circumstantial inferences from the facts actually proved by both parties. To avoid unfairness it may be important that the charge not permit the inference embodied in the presumption to retain, for purposes of the jury's evaluation of the defense, any of the "artificial" (*Yee Hem* v. *United States,* 268 U. S. 178, 185) increment of weight beyond its inherent probative force, which it had for procedural purposes. This is because a presumption which is evidence may have as much weight as the jury wants to give it and hence may become, in the jury's discretion, for practical purposes irrebuttable. A conclusion that Congress did not intend the statute herein to create a presumption with such effect is not equivalent to a conclusion that the presumption is overcome by evidence which, weighed alone independently of any impetus from the presumption, the jury finds incredible.

The proper procedural effect of the presumption at this point in the trial is that on submission of the whole case to the jury the presumption "remains in abeyance pending the jury's reaching this preliminary decision as to the credence to be given the evidence on this particular point." (*Gillett* v. *Michigan United Traction Co.,* 205

Mich. 410, 421, 171 N. W. 536 (1919), an admirable discussion of what we conceive to be the correct rule). If the jury believes that the rebutting evidence has credibility, the coercive effect of the presumption is terminated, and unless distorted by an incorrect charge it retains as against the rebutting evidence only such effect as any inherent probability of the circumstantial inference which it embodies would have in the absence of the statutory presumption. Further, an affirmative distortion by the charge, and not a mere ambiguity in the charge, is prerequisite to a claim that there has occurred a shifting of the burden of persuasion or a treatment of the presumption as evidence. *Atlantic Coast Line* v. *Ford*, 287 U. S. 502, 507.

Since the defense here turned on a specific denial by petitioner himself, the case stood or fell on the credibility of his denial, not on the probability of the inference embodied in the presumption, be that probablity great or small. The charge is not here under attack, but it will be noted that it was standard on reasonable doubt (R. 40, 41) and was so detailed on credibility (R. 41–42) that it could not have failed to make clear to the jury that credibility was the only issue in the case. If the jury found petitioner worthy of belief or indeed even if they could not make up their minds whether or not to believe him, they were thus charged to

acquit him,[22] and they were not asked to balance off the probability of actual receipt from out of the state subsequent to the Act against the probability that petitioner was the sort of person they could believe. And on the other hand, even if they felt that the inference embodied in the presumption was most improbable, they could still properly convict if they had no confidence at all in the defense witnesses or in the particular story which the defense chose to tell, for the failure of his defense left petitioner "as though he stood mute facing the presumption." *Tomkins Cove Stone Co.* v. *Bleakley Transportation Co.*, 40 F. (2d) 249, 251 (C. C. A. 3). Petitioner, in short, has simply failed to "go forward with evidence enough to raise doubts as to the validity of the inference," *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U. S. 104, 111.

The foregoing discussion shows the misapprehension which has caused petitioner to contend that the decisions below conflict with the due process clause on the ground that they deprive him of a fair opportunity to rebut the presumption. As we have seen, they allow him the unrestricted opportunity to rebut the presumption by

[22] In accord with *Davis* v. *United States*, 160 U. S. 469, and *Matheson* v. *United States*, 227 U. S. 540, dealing with the charge on the rebuttal of the so-called presumption of sanity in federal criminal cases, and discussed above, p. 16.

evidence which on its own merits the jury finds sufficiently credible to create a reasonable doubt of his guilt. Moreover, as the court below noted (R. 84), this Court has sustained against similar attack other presumption statutes imposing on the rebuttal far more onerous restrictions than any imaginable here. For instance, in *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729, a provision of the old Chinese exclusion law was upheld which forbade even the introduction of testimony to rebut the presumption of nonresidence unless that testimony was that of a "credible white witness." This restriction precluded resort to the ordinarily available sources of rebuttal testimony. A further example is *Hawes* v. *Georgia*, 258 U. S. 1, where a Georgia statute was upheld which presumed knowledge of an illicit still from occupation of the tract of land upon which the still was located, although under the governing Georgia procedure the defendant could not testify on his own behalf under oath, and his wife could not testify for him at all.

Because neither the statute nor the decisions below accord the presumption the status of evidence, any effect of *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639 (compare *Ferry* v. *Ramsey*, 277 U. S. 88), as a restriction on legislative power need not be considered.

## CONCLUSION

For these reasons it is respectfully submitted that the judgment of the court below should be affirmed.

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WENDELL BERGE,
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# SUPREME COURT OF THE UNITED STATES.

Nos. 569, 636.—October Term, 1942.

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| Frank Tot, Petitioner, 569 *vs.* The United States of America. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit. |
| The United States of America, Petitioner, 636 *vs.* Frank Delia. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. |

[June 7, 1943.]

Mr. Justice Roberts delivered the opinion of the Court.

These cases involve the construction and validity of §2(f) of the Federal Firearms Act,[1] which is:

"It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

In No. 569, Tot, the petitioner, was convicted[2] upon an indictment which charged that he, having been previously convicted of two crimes of violence, a burglary and an assault and battery, with intent to beat, wound, and ill-treat,[3] on or about September 20, 1938, at Newark, New Jersey, knowingly, unlawfully, and feloniously received a described firearm which "had been shipped and transported in interstate commerce to the said City of Newark." The Circuit Court of Appeals affirmed the judgment.[4]

[1] c. 850, 52 Stat. 1250, 1251; 15 U. S. C. § 902(f).

[2] See 42 F. Supp. 252.

[3] These are crimes of violence according to the definition contained in § 1(6) of the Act 15 U. S. C. § 901(6).

[4] 131 F. 2d 261.

The Government's evidence was that Tot had been convicted of assault and battery in 1925, and had pleaded *non vult* to a charge of burglary in 1932 in state courts, and that, on September 22, 1938, he was found in possession of a loaded automatic pistol.

After denial of a motion for a directed verdict, Tot took the stand and testified that he purchased the pistol in 1933 or 1934. He admitted the criminal record charged in the indictment and other convictions. His sister and his wife testified in corroboration of his evidence, but their testimony was shaken on cross-examination. In rebuttal the Government produced a representative of the manufacturer who testified that the pistol had been made in Connecticut in 1919 and shipped by the maker to Chicago, Illinois. At the close of the case petitioner renewed his motion for a directed verdict, which was denied.

In No. 636, Delia, the respondent, was convicted upon two counts. The first alleged that, on September 25, 1941, he was a person previously convicted of a crime of violence,—robbery while armed,[5] —and that he received and possessed a firearm, described in the indictment, "which firearm had theretofore been shipped and transported in interstate commerce." The second repeated the allegation of previous conviction and charged that, on September 25, 1941, he received and possessed certain cartridges which "had been theretofore shipped and transported in interstate commerce." The Government's proof was that Delia had been convicted of armed robbery and, on September 25, 1941, had in his possession a loaded revolver which had been manufactured in Massachusetts prior to 1920; that some of the cartridges in the pistol had been manufactured in Ohio and some in Germany, the former after 1934 and the latter at an unknown date. The respondent testified that he had, at about the time of his arrest, picked up the revolver when it was dropped by a person who attacked him, but there was testimony which tended to contradict this defense. The Circuit Court of Appeals reversed the conviction on each count.[6]

Both courts below held that the offense created by the Act is confined to the receipt of firearms or ammunition as a part of interstate transportation and does not extend to the receipt, in an intrastate transaction, of such articles which, at some prior time, have been transported interstate. The Government agrees that

[5] Armed robbery is a crime of violence as defined in § 1(6) of the Act.
[6] 131 F. 2d 614.

this construction is correct. There remains for decision the question of the power of Congress to create the presumption which §2(f) declares, namely, that, from the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute.

The Government argues that the presumption created by the statute meets the tests of due process heretofore laid down by this court. The defendants assert that it fails to meet them because there is no rational connection between the facts proved and the ultimate fact presumed, that the statute is more than a regulation of the order of proof based upon the relative accessibility of evidence to prosecution and defense, and casts an unfair and practically impossible burden of persuasion upon the defendant.

An indictment charges the defendant with action or failure to act contrary to the law's command. It does not constitute proof of the commission of the offense. Proof of some sort on the part of the prosecutor is requisite to a finding of guilt; it may consist of testimony of those who witnessed the defendant's conduct. Although the Government may be unable to produce testimony of eye witnesses to the conduct on which guilt depends, this does not mean that it cannot produce proof sufficient to support a verdict. The jury is permitted to infer from one fact the existence of another essential to guilt, if reason and experience support the inference. In many circumstances courts hold that proof of the first fact furnishes a basis for inference of the existence of the second.[7]

The rules of evidence, however, are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States.[8] The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of facts evidence of the

[7] Wilson v. United States, 162 U. S. 613, 619.

[8] Ex parte Fisk, 113 U. S. 713, 721; Adams v. New York, 192 U. S. 585, 599; Mobile J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 42; Bailey v. Alabama, 219 U. S. 219, 238; Luria v. United States, 231 U. S. 9; Hawes v. Georgia, 258 U. S. 1, 4.

existence of the ultimate fact on which guilt is predicated. The question is whether, in this instance, the Act transgresses those limits.

The Government seems to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.[9] This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case.[10] But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.

The Government seeks to support the presumption by a showing that, in most states, laws forbid the acquisition of firearms without a record of the transaction or require registration of ownership. From these circumstances it is argued that mere possession tends strongly to indicate that acquisition must have been in an interstate transaction. But we think the conclusion does not rationally follow. Aside from the fact that a number of states have no such laws, there is no presumption that a firearm must have been lawfully acquired or that it was not transferred interstate prior to the adoption of state regulation. Even less basis exists for the inference from mere possession that acquisition occurred subsequent to the effective date of the statute, July 30, 1938. And, as no state laws or regulations are cited with respect to the acquisition of ammunition, there seems no reasonable ground for a presumption that its purchase or pro-

[9] Mobile J. & K. C. R. Co. v. Turnipseed, *supra*, p. 43; Bailey v. Alabama, *supra*, 239; Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 81; Luria v. United States, *supra*, 25; McFarland v. American Sugar Ref. Co., 241 U. S. 79, 86; Manley v. Georgia, 279 U. S. 1; Western & A. R. Co. v. Henderson, 279 U. S. 639, 642; Morrison v. California, 291 U. S. 82, 90.

[10] Bailey v. Alabama, *supra*, 235.

curement was in interstate rather than in intrastate commerce.[11] It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience.

Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.[12]

Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision.

Doubtless the defendants in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. The argument from convenience is admissible only where the inference is a permissible one, where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship.[13] Even if the presumption in question were in itself reasonable, we think that the nature

[11] Delia was convicted upon an indictment which charged, inter alia, receipt of ammunition.

[12] McFarland v. American Sugar Ref. Co., *supra*, 86.

[13] Morrison v. California, *supra*, 94, 96.

of the offense, and the elements which go to constitute it, render it impossible to sustain the statute, for the reason that one element of the offense is the prior conviction of a crime of violence. If the presumption warrants conviction unless the defendant comes forward with evidence in explanation and if, as is necessarily true, such evidence must be credited by the jury if the presumption is to be rebutted, the defendant is under the handicap, if he takes the witness stand, of admitting prior convictions of violent crimes. His evidence as to acquisition of the firearm or ammunition is thus discredited in the eyes of the jury before it is given.

Although the Government recognizes that the authorities cited in Note 9 announce the rule by which the validity of the Act is to be tested, it relies on certain other decisions as supporting the legislation. We think that what was decided in those cases was not a departure from the rule and that they are distinguishable from the instant cases.

In *Adams* v. *New York*, 192 U. S. 585, a state statute made it an offense "knowingly" to possess policy slips and provided that possession should be presumptive evidence "of possession thereof knowingly". The statutory presumption was sustained. Accidental and innocent possession of such a paper would be extraordinary and unusual and the statutory presumption was hardly needed to justify a jury in inferring knowledge of the character of the policy slip by one found in possession of it.

In *Hawes* v. *Georgia*, 258 U. S. 1, the statutory offense was that of knowingly permitting a still upon the defendant's premises. The statute provided that when distilling apparatus was found on the premises this should be *prima facie* evidence that the person in actual possession had knowledge of its existence. The defendant's premises were a farm on which a still was found. This court sustained the presumption. The inference so accorded with common experience that a statutory provision scarcely was necessary to shift the burden of proof.

In *Fong Yue Ting* v. *United States*, 149 U. S. 698, an Act of Congress was involved which required every Chinese alien within one year to procure from the Collector of Internal Revenue a certificate of residence and made it the duty of such alien to produce the certificate on request. Any officer was authorized to arrest a Chinese alien failing to produce the certificate on request and to hold him for deportation. The Act placed on the

alien the burden of proving at the deportation hearing his residence and of excusing his failure to procure a certificate. Failure to have in his possession the certificate the law required him to have gave rise to a natural inference of intentional failure to procure it or unlawful residence in the country which precluded his procuring it. In such a situation the shifting to the alien of the burden of explanation imposed no unreasonable hardship upon him.

In *Yee Hem* v. *United States*, 268 U. S. 178, it appeared that an Act of Congress prohibited importation of opium except under Treasury regulations and the latter forbade importation of smoking opium. The statute made it an offense knowingly to conceal opium illegally imported and threw upon a defendant found in possession of smoking opium the burden of showing that he had not acquired it through illegal importation. This court sustained the presumption on the ground that no lawful purchase of smoking opium could occur in this country and that, therefore, possession gave rise to sinister implications. It concluded it was not unreasonable to create a presumption of unlawful importation as the source of the commodity the possession of which the defendant concealed.

In *Casey* v. *United States*, 276 U. S. 413, the offenses created by Act of Congress were the purchase or sale of morphine from packages not stamped with an Internal Revenue tax stamp. The defendant was charged with a purchase from such a package. The evidence showed that he dispensed the drug in clandestine fashion and not from a stamped package. In these circumstances, this court held that the presumption created by the statute that a sale of morphine from an unstamped package should be *prima facie* evidence of a similar purchase was not unreasonable or beyond the realm of common experience.

The Government seeks to sustain the statute on an alternative ground. It urges that Congress, in view of the interstate commerce in firearms, might, in order to regulate it, have prohibited the possession of all firearms by persons heretofore convicted of crimes of violence; that, as the power of Congress extends so far, the presumption that acquisition was in interstate commerce is the lesser exertion of legislative power and may be upheld.[14] Two considerations render the argument inadmissible. First, it will not serve to sustain the presumption of acquisition after

[14] See Ferry v. Ramsay, 277 U. S. 88.

the effective date of the Act, and secondly, it is plain that Congress, for whatever reason, did not seek to pronounce general prohibition of possession by certain residents of the various states of firearms in order to protect interstate commerce, but dealt only with their future acquisition in interstate commerce.

The judgment in No. 569 is reversed and that in No. 636 is affirmed.

Mr. Justice MURPHY took no part in the consideration or decision of these cases.

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Mr. Justice BLACK, with whom Mr. Justice DOUGLAS concurs, concurring.

I agree that the mere possession of a pistol coupled with conviction of a prior crime is no evidence at all that the possessor of the pistol has acquired it in interstate commerce or obtained it since the effective date of the Act under consideration. The Act authorizes, and in effect constrains juries to convict defendants charged with violation of this statute even though no evidence whatever has been offered which tends to prove an essential ingredient of the offense. The procedural safeguards found in the Constitution and in the Bill of Rights, *Chambers* v. *Florida*, 309 U. S. 227, 237, stand as a constitutional barrier against thus obtaining a conviction, *ibid.*, 235-238. These constitutional provisions contemplate that a jury must determine guilt or innocence in a public trial in which the defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against a defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained.

It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment.